



U.S. Chamber of Commerce

**The European Commission's Attack
on In-House Counsel Privilege**

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I. INTRODUCTION

The in-house counsel privilege is under attack in the European Union. In an ongoing competition investigation of the U.S. corporation Broadcom, the European Commission (Commission) is taking an aggressive position that U.S. companies must surrender documents located in the United States containing communications with U.S.-based in-house counsel that are privileged under U.S. law. The Commission's decision could lead to significant fines and penalties if the company does not hand over these materials. And it opens the door for similar hostile acts against other U.S. companies that operate in Europe.

Broadcom challenged the Commission's decision before the EU's General Court. But on August 3, 2026, the President of the General Court denied Broadcom's request for interim relief. While preliminary, that ruling sets the stage for what promises to be a groundbreaking decision. For the first time, EU courts must decide whether the EU's privilege rules—which do not recognize privilege for in-house lawyers—override other countries' regimes for non-EU companies whose affiliates do business in Europe. That question is one of public international law and comity as much as privilege: It asks whether the EU will give effect to protections that attached under another sovereign's law long before the Commission opened its investigation.

The stakes are enormous and extend far beyond Broadcom. For over 40 years, U.S. companies have built their legal departments, internal investigations, and compliance programs on the foundational U.S. Supreme Court opinion in *Upjohn Co. v. United States*,² which recognized no distinction between in-house and outside counsel for privilege purposes. If the EU courts sustain the Commission's approach, every U.S. company with activities in Europe will face a regime in which its most sensitive legal communications can be seized—even if created by U.S.-qualified in-house lawyers, located in the U.S., advising on U.S. law, and in legitimate reliance on U.S. privilege protections. The result will be a chilling effect on candor, a degradation of corporate compliance, and a disruption of the international legal order. The U.S. business community has a substantial interest in the EU courts' rejection of the Commission's deeply misguided approach.

EU courts should resolve the Broadcom case by applying the same rule the Commission has demanded abroad. The Commission has told the U.S. Supreme Court that any domestic law reaching across borders should be applied with attention to the constraints of international law and considerations of international comity. And the Commission and its Directorate-General for Competition (DG Competition) have repeatedly urged U.S. courts that EU confidentiality rules should shield their own investigative files when those files would otherwise be discoverable under U.S. law. U.S. courts have respected these requests. EU courts should likewise apply principles of international law and comity to ensure that foreign privilege rules are honored in EU courts.

The discussion below explains (i) the essential role of in-house counsel in the U.S. legal system; (ii) recent developments in the EU that threaten the privilege afforded to U.S. and other

¹ The Chamber thanks Latham Watkins for its counsel and support in drafting this paper.

² 449 U.S. 383 (1981).

non-EU in-house counsel; (iii) the U.S. approach to in-house counsel privilege and attorney independence; and (iv) why principles of international law and comity require EU courts to respect the privilege afforded to U.S. in-house counsel under U.S. law.

II. IN-HOUSE COUNSEL PLAY AN ESSENTIAL ROLE IN THE U.S. LEGAL SYSTEM

In-house counsel have long held important positions in U.S. corporate life. In the 19th century, in-house attorneys were “held in high repute and their sage counsel was regularly sought” by members of senior management.³ Indeed, in-house roles were so important and well-regarded that federal judges were frequently persuaded to give up their life tenure to become corporate general counsel.⁴ By the turn of the 20th century, lawyers had become essential to U.S. financial and industrial enterprise.⁵

The same is true today. U.S.-based in-house counsel play a critical role furthering both corporate and public interests by conducting internal investigations, serving as advisors to corporate leadership, and ensuring legal compliance. The in-house investigatory function is the linchpin of these three duties. “When suspicions of significant problems with potentially serious legal consequences arise within organizations it is often the general counsel who persuades corporate constituents of the need to pursue the matter and initiates an internal investigation.”⁶

Three factors explain why these important investigatory functions often reside in-house.

The first factor is U.S. regulatory design. Many U.S. statutory and regulatory frameworks presuppose an internal legal function that is responsible for finding problems and proposing remedies first.⁷ These regimes “attempt to deputize, or at least acknowledge, the necessity of internal actors like in-house counsel” because internal compliance programs are better positioned to “effectively regulate corporate employees than external regulators who face information and resource constraints.”⁸ Thus, “[w]ithout willing and competent in-house counsel, the efforts of regulators are, without question, less effective.”⁹ This is true, in large part, due to in-house

³ Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 Ariz. L. Rev. 621, 621 (2002).

⁴ Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 958-59 (2005).

⁵ Ben W. Heineman, Jr., *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension* 28 (2016).

⁶ Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 1008 (2007).

⁷ See, e.g., 15 U.S.C. § 7245 (Sarbanes-Oxley Act provision requiring reporting of material violations of securities laws to the “chief legal officer” of a company); 31 U.S.C. § 5318(h) (Bank Secrecy Act provision permitting Secretary of the Treasury to create anti-money laundering compliance obligations); U.S. Sent’g Guidelines Manual §§ 8B2.1, 8C2.5(f) (U.S. Sent’g Comm’n 2023) (providing that compliance and ethics programs are relevant in organizational sentencing).

⁸ Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 Seton Hall L. Rev. 77, 139 (2011).

⁹ *Id.*

counsel's role in educating and advising corporate management on the corporation's legal obligations, implementing legal advice, and supporting broader legal compliance aims.¹⁰

The second factor is access to unfiltered information. “[A] lawyer in independent practice is sheltered from the informal, back-channel information that flows around the company.”¹¹ By contrast, in-house counsel have access that permits them to advise “in a more proactive *ex ante* manner,” producing “a dual competency or consciousness usually absent from outside legal service providers.”¹² Most in-house corporate law departments rely heavily on dense networks of relationships across a company and maintain routine contact with internal “clients” that can trigger their involvement in prevention and compliance activities. Because of these relationships, in-house counsel are often the first lawyers to hear of matters requiring legal input and the last to sign off before proposed actions become reality.

The final factor is timing. Outside counsel “have no way to insist upon early involvement. In that sense, their role is essentially always reactive.”¹³ But in-house counsel have a “right and responsibility to insist upon early legal involvement” in matters “that will raise significant legal issues.”¹⁴ The *ex ante* prevention of legal violations is thus “a creature of internal counsel” with “no analogy in traditional ‘law firm’ corporate law.”¹⁵

In-house counsel are effective in these investigatory, advising, and compliance roles because they have the same rights, privileges, and obligations as outside counsel. The U.S. does not split its legal profession. All counsel—internal or external—are “required to behave under the same rules.”¹⁶ The rules governing the professional conduct of U.S. in-house counsel are “generally the same as the rules for lawyers practicing on their own, for the government or in firms,” and all attorneys share an identical obligation to maintain the confidences of their clients.¹⁷ This means that U.S. in-house lawyers remain bound to exercise independent professional judgment, must not counsel or assist a client in criminal or fraudulent conduct, and must withdraw if continued employment would result in a violation of a disciplinary rule.¹⁸

¹⁰ See, e.g., Duggin, *supra* note 6, at 1005.

¹¹ Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1019 (1997).

¹² Simmons & Dinnage, *supra* note 8, at 113-15.

¹³ Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 280-81 (1985).

¹⁴ *Id.* at 281.

¹⁵ *Id.* at 284-85.

¹⁶ Alison M. Hill, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 Case W. Res. J. Int'l L. 145, 184 n.178 (1995).

¹⁷ *Id.* at 168.

¹⁸ Professional ethical obligations are established by state authorities. The American Bar Association's Model Rules of Professional Conduct provide an overview of ethical obligations commonly imposed. See Model Rules of Pro. Conduct (Am. Bar Ass'n 2023), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/; *id.* R. 2.1 (“[A] lawyer shall exercise independent professional judgment and render candid advice.”); *id.* R. 1.2(d) (“A lawyer shall not

On a practical level, many U.S. corporate legal departments look like law firms. Some U.S. in-house legal departments employ hundreds of attorneys and “replicate the range of skills and potential economies available in the largest outside law firms.”¹⁹ And in the U.S., substantive legal work is increasingly performed by the corporation’s own attorneys.²⁰ Friendly acquisitions are often done in-house, as is a substantial part of the legal work on hostile takeover attempts. Many routine Securities and Exchange Commission filings are also handled primarily by in-house corporate counsel.²¹ So too with litigation. Indeed, it is not uncommon for in-house counsel to represent a corporation in court. The former general counsel of accounting firm Ernst & Young observed that, during his tenure, “our in-house legal staff . . . argued three cases in the United States Supreme Court and more than 40 cases in federal and state courts of appeal.”²²

Underscoring the broad competencies of internal legal departments, U.S. corporations routinely recruit lawyers from the best U.S. law firms, and firms likewise recruit lawyers from in-house legal departments.²³ Litigation remains the largest legal service for which corporations use outside counsel, and they typically outsource matters that are large, complex, or specialized—reflecting a strategic division of labor rather than a difference in professional competence.²⁴

III. RECENT DEVELOPMENTS IN THE EU THREATEN U.S. AND OTHER NON-EU IN-HOUSE COUNSEL PRIVILEGE

A. A Brief History of EU Legal Professional Privilege

The EU generally recognizes legal professional privilege (LPP).

The foundational case is *AM & S Europe v. Commission*, which first recognized the privilege.²⁵ There, the Court of Justice surveyed the privilege laws of EU member states and concluded that a sufficient consensus justified the adoption of EU-wide protections for lawyer-client communications in Commission investigations. But the court adopted two limitations on LPP based on its analysis of member states’ national laws: Communications are privileged only if (1) made expressly for a legal defense, and (2) made by an independent lawyer. For that second limitation, the court emphasized that the purpose of legal practice was to provide outside advice for a client’s defense—a standard that in-house attorneys could not meet.

counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”); *id.* R. 1.16(a)(1) (providing that, generally, “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law”).

¹⁹ Chayes & Chayes, *supra* note 13, at 278.

²⁰ *Id.* at 292-94.

²¹ *See id.* at 294-95.

²² Liggio, *supra* note 3, at 627 n.18.

²³ David B. Wilkins, *Is the In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 Wis. L. Rev. 251, 252.

²⁴ Simmons & Dinnage, *supra* note 8, at 126; George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. Rev. 1635, 1654-55 (2006).

²⁵ *See* Judgment of May 18, 1982, Case 155/79, EU:C:1982:157.

While *AM & S* contemplated only written communications exchanged directly between an attorney and a client, subsequent decisions have broadened LPP's scope. *Hilti v. Commission*²⁶ extended LPP to cover internal documents reproducing the contents of attorney-client communications, even if those documents were not directly shared between the lawyer and the client. More significantly, *Akzo Nobel Chemicals Ltd. v. Commission*²⁷ held that LPP safeguarded working documents produced in the course of a legal defense, including documents produced by the client for the purpose of communicating with the attorney even if not shared with the attorney.

EU courts have also expanded LPP to protect communications covering a greater range of substantive topics. For example, *Orde van Vlaamse Balies*²⁸ held that LPP protects not just communications directly related to a client's defense but any legal advice, even if unrelated to active litigation. Similarly, *Ordre des avocats du Barreau de Luxembourg*²⁹ extended LPP to legal advice in any area of the law, even if unrelated to the subject of the Commission's investigation.

Notwithstanding the expansion of LPP, major limitations still exist. Most significantly, the Commission and EU courts do not recognize LPP over communications between in-house counsel and their clients. In 2010, *Akzo* explicitly reaffirmed *AM & S*'s exception for in-house attorneys, stating that the "legal situation in the Member States . . . ha[d] not evolved" and that most member states still did not recognize a privilege for in-house lawyers.³⁰ Officials in the DG Competition reaffirmed that position in a recent "Competition Policy Brief."³¹

B. The Current Broadcom Litigation

Although EU courts have held that privilege does not attach to EU in-house counsel, they have had no occasion to decide whether EU privilege rules displace the privilege protections in jurisdictions where the advice was sought and given.

That is changing. During its ongoing competition investigation of Broadcom Inc. and VMware International Unlimited Co. (collectively, Broadcom), the Commission has taken an aggressive approach. And for the first time, a company is challenging a decision compelling the production of communications privileged under U.S. law. This places the question directly before the EU courts and makes their forthcoming decision a landmark on the reach of EU privilege rules beyond EU borders.

During its investigation, the Commission issued a decision requiring Broadcom to produce documents located outside the EU, in the custody of non-EU corporate affiliates, privileged in their respective non-EU jurisdictions, and containing advice related to non-EU law. Initially, the Commission's order required Broadcom to produce even communications with non-EU *outside* lawyers. After Broadcom brought applications before the EU General Court challenging that

²⁶ Order of April 4, 1990, T-30/89, EU:T:1990:27.

²⁷ See Judgment of September 14, 2010, Case C-550/07 P, EU:C:2010:512.

²⁸ Judgment of December 8, 2022, C-694/20, EU:C:2022:963.

²⁹ Judgment of September 26, 2024, C-432/23, EU:C:2024:791.

³⁰ *Akzo* ¶ 76.

³¹ Massimiliano Kadar et al., Eur. Comm'n, *Legal Professional Privilege in Competition Law Investigations: Has the Status of In-House Lawyers Changed?*, Competition Policy Brief (Nov. 2025).

decision, the Commission backtracked, amending its decision to require production only of communications with in-house counsel. The Commission thus drew the categorical line that LPP extends to *all* communications with outside lawyers but to *no* communications with in-house lawyers, irrespective of the protections afforded to in-house communications in other jurisdictions.

In its applications, Broadcom argued that LPP should extend to communications with in-house counsel, at least as applied to non-EU in-house counsel whose communications are privileged under their own national laws and do not contain advice on EU law. The President of the General Court denied Broadcom's application for interim relief on August 3, 2026.³² The court reasoned that, under *AM & S* and *Akzo*, an exchange must relate to the client's rights of defense and emanate from an independent lawyer.³³ According to the court, independence is defined by the absence of employment, so privilege does not cover exchanges with in-house lawyers, who allegedly lack independence from their employer and are less able to manage conflicts between professional obligations and their employer's aims.³⁴ The court emphasized that the scope of LPP is an autonomous concept of EU law, such that the uniform application of EU law would be undermined if other countries' privilege rules were decisive.³⁵ The court also rejected Broadcom's other arguments based on (among other things) principles of international law (including those of territoriality and comity), the EU Charter of Fundamental Rights, the European Convention on Human Rights, and principles of proportionality under EU law.

The order denying interim relief is not a final decision on these issues. Broadcom has appealed the denial of interim relief to the EU Court of Justice, and its merits case before the General Court also remains pending.³⁶

IV. U.S. LAW RECOGNIZES IN-HOUSE COUNSEL'S INDEPENDENCE AND PROTECTS THEIR COMMUNICATIONS

The development and operation of U.S. privilege law concerning in-house counsel is instructive as the EU courts consider arguments that could eviscerate this privilege for all U.S. companies operating in Europe.

A. The *Upjohn* Rule and Its Application to In-House Counsel

The U.S. Supreme Court's decision in *Upjohn Co. v. United States* held that attorney-client privilege extends to communications between corporate counsel and employees at all levels.³⁷ The case arose in a factual scenario that remains common. A pharmaceutical manufacturer learned

³² See *Broadcom Inc. & VMware Int'l Unlimited Co. v. Commission*, Case T-280/26 R (Order of the President of the Gen. Ct. of Aug. 3, 2026).

³³ *Id.* ¶¶ 38-41.

³⁴ *Id.* ¶¶ 42-43.

³⁵ *Id.* ¶¶ 45-46.

³⁶ See, e.g., Anthony Woolich & Milo Graham, *The Importance of Obtaining Legal Advice from External Counsel to Benefit from Legal Professional Privilege under EU Law* (Aug. 24, 2026), <https://www.blakemorgan.co.uk/the-importance-of-obtaining-legal-advice-from-external-counsel-to-benefit-from-legal-professional-privilege-under-eu-law/>.

³⁷ 449 U.S. 383 (1981).

through accountants auditing a foreign subsidiary that the subsidiary had made payments to or for the benefit of foreign government officials to secure government business, thus raising legal questions under U.S. law.³⁸ The company's general counsel proceeded to conduct an internal investigation, preparing a questionnaire sent to foreign managers.³⁹ Based on the results of this investigation, the company voluntarily disclosed the payments to the U.S. government. The government then sought discovery of the written questionnaires. The company refused to disclose the documents, asserting that the questionnaires were protected by attorney-client privilege because they were related to the general counsel's legal advice.

The U.S. Supreme Court agreed. The Court presented three rationales for its holding. The first was candor. The purpose of the attorney-client privilege, the Court explained, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁴⁰ The Court found that this purpose was deeply rooted in U.S. case law and tradition. For example, in 1888, the Supreme Court had noted that the privilege was "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."⁴¹

The second rationale was that accurate legal advice depends on information flow, and that in the corporate setting the information flow runs through employees.⁴² "Middle-level and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would hold the relevant information corporate counsel requires in order to advise adequately."⁴³ Without access to this information, in-house counsel could not provide accurate legal advice.

Finally, the Court reasoned that in light of the vast and complicated array of regulation confronting the modern corporation, employees "constantly go to lawyers to find out how to obey the law," particularly because compliance is hardly an instinctive matter.⁴⁴ The Court noted, for example, that "the behavior proscribed" by U.S. antitrust laws is "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."⁴⁵ As a result, compliance with these laws requires consultation with counsel who are intimately aware of a corporation's activities and protected by privilege.

Importantly, the Court rejected the government's argument that the risk of civil or criminal liability alone suffices to ensure that corporations will seek legal advice even without privilege. That response was inadequate because, without privilege, "the depth and quality of any

³⁸ See *id.* at 386-87.

³⁹ See *id.*

⁴⁰ *Id.* at 389.

⁴¹ *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

⁴² *Upjohn*, 449 U.S. at 390-91.

⁴³ *Id.* at 391.

⁴⁴ *Id.* at 392 (citation omitted).

⁴⁵ *Id.* at 392 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978)).

investigations[] to ensure compliance with the law would suffer, even were they undertaken.”⁴⁶ Because compliance serves important public purposes, the quality of a corporation’s internal investigation and compliance program is likewise of utmost importance. And privilege is essential to serving that goal. Any “narrow[er] scope given the attorney-client privilege” would “not only make[] it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but [would] also threaten[] to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”⁴⁷

Following *Upjohn*, U.S. courts have routinely reaffirmed that the in-house status of an attorney does not “dilute the privilege.”⁴⁸ Indeed, *Upjohn* has shaped U.S. corporate legal departments for decades. The protected channel *Upjohn* secured has allowed companies to shift the legal function from reactive defense to programmatic prevention, embedding lawyers in daily operations, compliance education, monitoring, and legal audits, and pushing legal involvement to an earlier phase of every important corporate initiative and transaction.

B. The Scope of U.S. In-House Counsel Privilege

Under U.S. law, privilege is a function of the character of the communication rather than the job title of the participant. Privilege attaches where legal advice is sought in confidence from an attorney.⁴⁹ But the privilege does not apply to all communications between a lawyer and non-lawyer colleagues. Rather, the privilege applies only to those *acting* as attorneys. As the preeminent scholar of U.S. evidence law stated in his canonical formulation, privilege protects only legal advice being sought from a professional legal advisor “in his capacity as such,” with the communications relating to that purpose and made in confidence by the client.⁵⁰ Thus, if a communication is made for business purposes rather than for any significant legal purpose, or if the attorney is acting in a role other than that of a lawyer, privilege does not apply.⁵¹

The importance of in-house legal privilege is underscored by the profoundly broad scope of discovery in the U.S. system. “Discovery in U.S. federal courts is far broader in scope than in other countries and is primarily conducted and controlled by the parties, rather than by judges.”⁵² The Federal Rules of Civil Procedure permit a party to “obtain discovery regarding *any* nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs

⁴⁶ *Id.* at 393 n.2.

⁴⁷ *Id.* at 392.

⁴⁸ *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014).

⁴⁹ *See Fisher v. United States*, 425 U.S. 391, 403 (1976).

⁵⁰ 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292, at 554 (John T. McNaughton rev. 1961).

⁵¹ *See, e.g., Pritchard v. County of Erie (In re County of Erie)*, 473 F.3d 413, 419 (2d Cir. 2007) (“[A] confidential communication between client and counsel is privileged only if it is generated for the purpose of obtaining or providing legal assistance . . . as opposed to business advice.”); *NEBCO, Inc. v. Butler*, No. 4:22-cv-3217, 2024 WL 3555104, at *2 (D. Neb. July 25, 2024) (similar); *Crider, Inc. v. Silgan Containers LLC*, No. 3:21-cv-1047, 2023 WL 479094, at *12 (N.D. Tex. Jan. 13, 2023) (similar); *Solis v. Milk Specialties Co.*, 854 F. Supp. 2d 629, 632 (E.D. Wis. 2012) (similar).

⁵² Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2029, 2093 (2020).

of the case.”⁵³ This rule imposes few bright lines. And in many cases involving large corporations, such discovery can involve millions of documents. The near-universal use of electronic communication in the corporate environment has only expanded the range of materials that are subject to discovery. One of the primary limitations on this broad discovery rule is the in-house attorney-client privilege, which must be affirmatively claimed and substantiated. Against this backdrop, the privilege operates as a substantial legal barrier standing between an adversary and its ready access to the corporation’s internal legal deliberations.

C. The Critical Distinction Between U.S. and EU Privilege: Different Understandings of Attorney Independence

Attorney-client privilege rests on different underpinnings and assumptions in the EU and the U.S.

In the EU, LPP was historically oriented toward rights of defense, though it has more recently been confirmed to apply more broadly to legal advice generally. The rationale of limiting LPP to outside counsel is the understanding that a lawyer must be independent to provide sound legal advice. Some EU jurisdictions require that in-house counsel relinquish membership in bar associations, meaning these attorneys are not necessarily subject to the same ethical and professional requirements as outside counsel. EU case law thus assumes that where a lawyer is economically dependent on a single employer or not a member of a bar, objective counseling may be compromised.

The U.S. is quite different. In the U.S., the purpose of attorney-client privilege is to encourage candor and legal compliance. These aims can be achieved without regard to a lawyer’s employer, and the U.S. Supreme Court and lower courts have thus held that the availability of privilege does not depend on a lawyer’s employment status.

Moreover, U.S. professional ethical rules do not distinguish between in-house and external lawyers. Both in-house and external lawyers must be members of the bar. And both are subject to the same independence requirement. A common recitation of that requirement, which is drawn from the American Bar Association’s Model Rules of Professional Conduct, requires that “a lawyer shall exercise independent professional judgment and render candid advice.”⁵⁴ These ethical frameworks are enforced through state bar disciplinary mechanisms, meaning that an in-house lawyer who fails to exercise independent judgment in the face of employer pressure risks sanctions, suspension, or disbarment—serious consequences that safeguard independence.

The rationale for the ethical requirement of independent judgment is clear. As the U.S. Supreme Court has stated, “[a]n attorney’s ethical duty to advance the interests of his client is

⁵³ Fed. R. Civ. P. 26(b)(1).

⁵⁴ N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0, R. 2.1 (2023); *see, e.g.*, Cal. R. Pro. Conduct 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”); Tex. Disciplinary R. Pro. Conduct 2.01 (similar). This rule is drawn from the American Bar Association’s Model Rules of Professional Conduct. *See supra* note 18.

limited by an equally solemn duty to comply with the law and standards of professional conduct.”⁵⁵ In other words, attorneys owe responsibilities not only to their clients but also to the courts and society. As the Illinois Supreme Court has explained, “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁵⁶ To satisfy these multiple responsibilities, attorneys must provide independent counsel even when it is undesired or could put the attorney’s employment at risk. After all, “[a] client is entitled to straightforward advice expressing the lawyer’s honest assessment”—even if “the advice will be unpalatable to the client.”⁵⁷ Ensuring that attorney-client communications are privileged “serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”⁵⁸

V. EU COURTS SHOULD RESPECT U.S. IN-HOUSE COUNSEL PRIVILEGE

A. Failing to Recognize U.S. Privilege for In-House Counsel Would Disrupt Settled Expectations and Essentially Apply EU Law Extraterritorially

For over four decades, U.S. corporations have structured their legal departments, internal investigations, and compliance programs around the attorney-client privilege framework recognized in *Upjohn*. As a result, U.S.-based corporations’ relationship with in-house counsel is premised on candor and compliance. And the long-settled expectation is that privilege will be broadly applied. Applying the EU framework would unsettle that expectation and undermine the *Upjohn* candor-promoting function of privilege.

The asymmetry of the burden imposed by the EU’s rule makes its application to U.S. companies all the more inequitable. Because EU law withholds privilege from in-house lawyers, EU companies often retain outside counsel to conduct internal investigations and provide sensitive risk assessments and compliance advice. By contrast, U.S. companies entrust these same tasks to in-house legal departments in reliance on *Upjohn*. Applying the EU rule to U.S. in-house counsel places EU and U.S. companies on unequal footing. It penalizes U.S. companies for organizing their legal functions in the manner their own legal system encourages.

Refusing to recognize U.S. in-house privilege does not merely apply EU law within EU borders. It effectively exports the EU’s restrictive privilege regime to the U.S. and other non-EU jurisdictions just because corporate affiliates interact with the European market. In practice, the Commission’s approach compels U.S.-headquartered companies—under threat of coercive measures—to produce documents located outside the EU, in the custody of non-EU entities, involving non-EU legal advice, and protected by the laws of non-EU jurisdictions. This constitutes an exercise of extraterritorial enforcement jurisdiction that violates established principles of public international law. Were this rule to prevail, the only U.S. companies that could preserve in-house privilege in any meaningful sense would be those whose operations do not reach Europe at all—a

⁵⁵ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600 (2010) (quoting *Nix v. Whiteside*, 475 U.S. 157, 168 (1986)).

⁵⁶ Ill. Sup. Ct. Order M.R. 3140, at 1 (2009).

⁵⁷ Ill. R. Pro. Conduct 2.1, cmt. 1 (2010).

⁵⁸ Ill. Sup. Ct. Order M.R. 3140, at 3.

shrinking universe given the global reach of the companies that most depend on sophisticated in-house legal departments.

The practical consequence of this extraterritorial overreach would be a devastating chilling effect on multinational compliance programs. If U.S. corporations cannot be assured that communications with their in-house counsel will remain privileged, they will inevitably adopt the most conservative approach, effectively treating no in-house communications as privileged. This race to the bottom would directly undermine the candor-promoting function that the attorney-client privilege was designed to serve. Indeed, as the U.S. Supreme Court warned in *Upjohn*, without the protection of privilege, multinational corporations will hesitate to put legal analysis in writing and rely more heavily on oral communications—and the quality of legal counsel “would suffer.”⁵⁹ Moreover, as the Court has remarked, if “much of what is now put down in writing” becomes “unwritten,” “inefficiency, unfairness and sharp practices” inevitably will develop.⁶⁰ Faced with legal uncertainty regarding the scope of privilege protections, companies may cease using in-house counsel for matters with a potential European nexus, substituting more expensive and less-informed outside counsel without the ability to act *ex ante*, thereby depriving corporations of efficient legal guidance precisely when the complexity of global regulatory compliance demands it most.

B. Not Recognizing U.S. Privilege for In-House Counsel Would Weaken Privilege in the U.S.

Not respecting U.S. in-house privilege in the EU would also weaken privilege in the U.S. U.S. antitrust investigations are a prime example. While the Federal Trade Commission, which enforces U.S. antitrust law, has publicly committed not to request documents that are privileged under U.S. law from foreign counterparts,⁶¹ that assurance does not completely protect privileged communications. EU and U.S. antitrust authorities maintain formal cooperation instruments that encourage information sharing.⁶² Although these frameworks exclude privileged materials, the exclusion is potentially porous: European case files, hearing transcripts, and public statements often reveal the substance of information that the Commission received, including in relation to in-house lawyers’ risk assessments and strategic advice, which could enable U.S. regulators to piece together privileged advice without having to see the underlying privileged documents.

These cross-border vulnerabilities carry profound compliance implications. If U.S. privilege is not respected in the EU, multinationals will likely need to structure their affairs on the

⁵⁹ 449 U.S. at 393 n.2.

⁶⁰ *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

⁶¹ See Alden F. Abbott & Ashley Gum, Fed. Trade Comm’n, *U.S. Privilege Following Akzo Nobel v. European Commission* (Oct. 3, 2018), <https://www.ftc.gov/enforcement/competition-matters/2018/10/us-privilege-following-akzo-nobel-v-european-commission>.

⁶² See *Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws—Exchange of Interpretative Letters with the Government of the United States of America*, Apr. 27, 1995, 1995 O.J. (L 95) 47; *Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws*, June 18, 1998, 1998 O.J. (L 173) 28.

assumption that advice from U.S. in-house counsel—though sacrosanct at home—may be seized in the EU and then used elsewhere. Such exposure would exert a profound chilling effect on communications and deliberations within corporations, discourage candid dialogue, and undermine robust self-policing regimes. The lack of a harmonized privilege standard would also collide with the reality of increasingly synchronized investigations by antitrust agencies worldwide, raising the risk that a single disclosure of privileged communications in one jurisdiction could cascade into global liability.⁶³ Until EU and U.S. authorities bridge this divide, companies would need to recalibrate their document creation, retention, and advocacy strategies to mitigate the extraterritorial reach of divergent privilege regimes.

C. EU Courts Should Respect U.S. In-House Privilege as a Matter of International Law and Comity

EU courts should respect the privilege that U.S. law affords communications with U.S. in-house counsel as a matter of public international law and comity, even if the EU does not grant precisely the same privilege to communications with EU in-house counsel.

As the U.S. Supreme Court has explained, comity is the principle that a country gives respect and “recognition . . . within its territory to the legislative, executive or judicial acts of another nation,” even where those acts depart from national norms or law.⁶⁴ U.S. courts regularly apply comity principles to respect foreign judgments and legal decisions as an “expression of understanding which demonstrates due regard . . . to international duty and convenience.”⁶⁵ In the discovery and privilege context specifically, U.S. courts apply comity principles to extend deference to foreign privilege norms. Where “alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings,” courts “defer[] to the law of the country that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether those communications should remain confidential.”⁶⁶ The “predominant” jurisdiction is “the place where the allegedly privileged relationship was entered into” or “the place in which that relationship was centered at the time the communication was sent.”⁶⁷

In practice, this means that “any communications touching base with the United States will be governed by the [U.S.] federal discovery rules while any communications related to matters solely involving [a foreign country] will be governed by the applicable foreign statute.”⁶⁸ As one court put it, “if an attorney-client privilege exists in a country, then comity requires us to apply that country’s law to the documents at issue.”⁶⁹ Importantly, foreign privilege laws need not be

⁶³ See Etsuko Kameoka, *Legal Professional Privilege in EU Competition Investigations* 9-10 (2023).

⁶⁴ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁶⁵ *GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014); see also *Reid v. Doe Run Res. Corp.*, 110 F.4th 1049, 1053 (8th Cir. 2024).

⁶⁶ *Astra Aktiebolag v. Amgen Pharms., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002) (quoting *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992)).

⁶⁷ *Id.* (quoting *Golden Trade*, 143 F.R.D. at 521-22).

⁶⁸ *Golden Trade*, 143 F.R.D. at 520 (collecting cases).

⁶⁹ *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 256 (N.D. Ill. 2000); see also *Eisai Ltd. v. Dr. Reddy’s Lab’ys, Inc.*, 406 F. Supp. 2d 341, 342 (S.D.N.Y. 2005) (“Japanese law accords such a privilege, which American courts should respect as a matter of comity.”); *Anwar v. Fairfield Greenwich*

“totally congruent with American attorney-client privilege law . . . in order to be accorded comity.”⁷⁰

As the Commission itself has urged in filings before the U.S. Supreme Court, “[i]n the European Union’s view, any domestic law that creates cross-border obligations should be applied and interpreted in a manner that is mindful of the restrictions of international law and considerations of international comity.”⁷¹ Consistent with this position, the Commission and its DG Competition have repeatedly appeared before U.S. courts to request recognition of EU privilege and confidentiality rules on comity grounds.

For example, *In re Rubber Chemicals Antitrust Litigation* involved the potential production of documents that the Commission had marked as confidential under a whistleblower program.⁷² The DG Competition submitted a letter to the U.S. court, explaining that “the documents requested . . . include confidential Commission documents,” that “protection of th[ose] documents is ‘indispensable to ensure the viability and efficacy of the Leniency Programme,’” and that disclosure would “undermine [the Commission’s] ability to initiate and prosecute future investigations.”⁷³ Relying in significant part on the DG Competition’s exhortations, the court denied the plaintiff’s motion to compel production of the documents because “the principles of comity outweigh the policies underlying discovery.”⁷⁴

Similarly, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*⁷⁵ involved the potential production of documents relating to a previous DG Competition investigation.⁷⁶ “The Commission, appearing as amicus curiae, assert[ed] that the documents [were] confidential under European law and that th[e] Court should deny the plaintiffs access to them pursuant to the doctrine of international comity.”⁷⁷ Even though the parties were “obligated to turn over” the documents under U.S. law “in the absence of a countervailing concern for international comity,” the court concluded that “the Commission’s interest in confidentiality outweigh[ed] the plaintiffs’ interest in discovery of the European litigation documents.”⁷⁸ The court explained that “international comity sometimes requires American courts to accommodate

Ltd., 982 F. Supp. 2d 260, 264 (S.D.N.Y. 2013) (same); *Philips N. Am. LLC v. Fitbit LLC*, 583 F. Supp. 3d 251, 260 (D. Mass. 2022) (same).

⁷⁰ *Eisai*, 406 F. Supp. 2d at 343; *see id.* (“Since the laws of two different jurisdictions will rarely be in such accord, application of any such rule would be inconsistent with the basic notion of extending comity to foreign law.”).

⁷¹ Br. of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 5, *United States v. Microsoft*, 584 U.S. 298 (2018).

⁷² 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

⁷³ *Id.* at 1083-84.

⁷⁴ *Id.* at 1084.

⁷⁵ No. 05-md-1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010).

⁷⁶ *Id.* at *1.

⁷⁷ *Id.*

⁷⁸ *Id.* at *5, *9; *see also, e.g., In re Vitamins Antitrust Litig.*, No. MDL 1285, 2002 WL 34499542, at *5 (D.D.C. Dec. 18, 2002) (addressing “the concerns of the [Commission] . . . out of respect for the [Commission] as a foreign sovereign”).

foreign interests” even though, in that case, “the European rules exhibit[ed] a greater solicitude for confidentiality than the equivalent United States procedures.”⁷⁹

As a matter of comity and reciprocity, EU courts should accord U.S. law the same respect that the Commission has sought with regard to EU documents in U.S. courts. The Commission cannot consistently maintain that comity obliges U.S. courts to subordinate their own broad discovery rules to EU confidentiality interests, while simultaneously insisting that the uniform application of EU law leaves no room for the privilege rules of the sovereign where the advice was sought and given. That asymmetry—comity when EU interests are at stake, autonomy when they are not—is precisely what the doctrine of comity forbids. U.S. courts have made clear that Commission requests for confidentiality are heeded “in the hope of securing reciprocal respect and cooperation from the institutions of foreign nations.”⁸⁰ If the Commission and EU courts are no longer willing to reciprocally respect U.S. privilege law, U.S. courts may similarly extend less deference to the Commission.

VI. CONCLUSION

The Commission’s position in the Broadcom investigation rests on a premise that U.S. law has long rejected: that a lawyer’s employment relationship, standing alone, matters to the quality of her legal advice or her ability to exercise the independent judgment her profession requires. U.S. in-house counsel are no different from outside counsel. They are admitted to the same bar, undertake the same kinds of practice, appear in the same courts, and are bound by the same ethical duties as outside counsel—including the obligation of independence. U.S. law has long protected in-house counsel’s legal communications because in-house counsel are entrusted with important investigatory, advisory, and compliance functions on which the U.S. regulatory system depends. Their access to unfiltered information, their ability to insist on early involvement, and their standing with corporate leadership position them to detect and prevent legal violations. A rule premised on their supposed lack of independence misunderstands both their professional obligations and their actual function.

Compelling production of documents located outside the EU and reflecting advice on non-EU law would convert an EU rule into an instrument of extraterritorial reach. The predictable response would not be improved compliance but a race to the bottom—less written legal analysis, greater reliance on oral advice, substitution of external counsel when more-informed in-house counsel would provide better legal service, and a disruption to U.S. statutory and regulatory frameworks that presuppose reliance on privileged in-house legal advice.

EU courts should avoid these negative effects and hold that the Commission may not compel production of communications privileged under the law of a non-EU sovereign, and that the privilege protections that U.S. companies enjoy under domestic law are entitled to recognition in Commission proceedings. Such recognition would simply bring EU courts into alignment with the DG Competition’s own position before U.S. courts: that foreign protections should be respected under longstanding notions of international law and comity.

⁷⁹ *Payment Card*, 2010 WL 3420517, at *9.

⁸⁰ *Id.* at *5.